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791-752—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 350 F. 2d 171.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1965, and a petition for rehearing was denied on September 1, 1965. The petition for a writ of certiorari was filed on September 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to establish a conspiracy to violate 29 U.S.C. 501(c).

STATUTE INVOLVED

29 U.S.C. 501 provides as follows:

> (a) *Duties of officers; exculpatory provisions and resolutions void.* The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
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> * * * * *
>
> (c) *Embezzlement of assets; penalty.* Any person who embezzles, steals, or unlawfully and

> willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and five co-defendants were convicted of conspiracy to violate 29 U.S.C. 501(c) (App. 15a–17a).[1] Petitioner was sentenced to five years' imprisonment and fined $5,000 (App. 119a–120a), and the court of appeals affirmed.

The indictment charged that petitioner conspired with various other persons to embezzle, steal and convert to their own and others' use the funds of a labor organization in New York City. The organization in question was a local of the United Textile Workers of America ("UTWA"), which later disaffiliated and operated as an independent local, and thereafter merged with a local of the International Brotherhood of Teamsters, of which petitioner was president. The pattern of conduct whereby funds were siphoned from the labor organization, though varying in details, was essentially the same both before and after the merger with petitioner's local; *i.e.*, the union's records were made to show that salaries and expenses were paid to

[1] "App." refers to the "Appendix for Appellant Scalza" filed in the court below. "Tr." refers to the transcript of trial in the district court.

certain union employees when, in fact, the amounts involved were paid to certain co-conspirators.

In 1957 the UTWA local was placed under the trusteeship of co-defendant Hyman, who employed co-defendant Brill as an organizer and co-defendant Cariello as bookkeeper (Tr. 59–62). Joan Kane, a government witness who was named as a co-conspirator but not as a defendant, was initially Cariello's assistant and assumed his duties as bookkeeper in September 1959.[1] Cariello explained to her that it was necessary that she make up her books in such a manner as to have $210 in cash left over each week. Of this sum $50 was to be paid to Brill and $100 and $60 cash, placed in separate envelopes, was to be taken to a bookstore on 57th Street and given to a man called "Rube" (Tr. 73–89). Reuben Levin, proprietor of the bookstore, testified that he received these envelopes and regularly turned them over to defendant Cotliar (Tr. 1772–1775). When Mrs. Kane later suggested to Cariello that, instead of manipulating the books, they issue checks payable to cash for these expenditures, he told her that such action would look even worse than what they were doing (Tr. 102).

Various devices were employed to create a weekly cash surplus. Persons were placed on the local's payroll who performed no service and received only a portion or, in some cases, none of their credited sal-

[1] During Cariello's tenure as bookkeeper, the union's records showed that one Herbert received $3,486.37 in 1958 and $668.40 in 1959 and that one Sabater received, as expenses, $1,698.37 in 1958 and $2,277.75 in 1959 (Govt. Ex. 454, 455). Both men testified that they did not actually receive these amounts (Tr. 879–881, 1036–1038).

aries (Tr. 103–121, 132–138). Others signed vouchers for expense money which they did not receive (Tr. 156–164, 862–883, 1030–1041, 1194–1250, 1466–1472, 1511–1513). The $210 payments were regularly delivered by different union personnel, sometimes to the bookstore, sometimes to an address on 23d Street, and sometimes to a public relations firm headed by Hyman, where delivery was made to Hyman or his partner (Tr. 82–89, 211–214, 892–895, 1200–1201, 1655–1657). When the cash surplus at the end of the week, achieved by the foregoing methods, exceeded $210 by a small amount, the excess would be placed in petty cash. If the excess were large, it would be turned over to Brill, who directed the affairs of the local after the termination of the trusteeship (Tr. 128).

In 1959, because of difficulties in meeting its financial obligations to the UTWA, the local disaffiliated and became an independent local. Thereafter, raids by other labor organizations reduced its membership by 1961 to about one thousand. To protect against these raids, Brill and other officers entered into negotiations for a merger with a small local affiliated with the Teamsters, headed by petitioner (Tr. 215–217, 219–221, 762–764, 1941, 1945). In January or February 1962 petitioner met in co-defendant Cotliar's hospital room with other co-defendants. At that time, Hyman offered to have the independent local merge with petitioner's Teamsters local if petitioner would agree to continue drawing $210 a week out of the union treasury, to be turned over to Hyman and Cotliar. Petitioner agreed (Tr. 218, 1895, 1946–1948). After the merger was ratified by the membership of the inde-

pendent local (Tr. 764–765), petitioner served as president of the combined organization.

At about this time, petitioner told Brill that he had bought the local "lock, stock and barrel", for $30,000 (Tr. 223). When Mrs. Kane asked petitioner whether it was true that he was paying cash for the local instead of the customary $210 a week, petitioner replied that it was true, that the weekly payments were "chicken feed" and that he had to have complete control (Tr. 227–229). In fact, however, the weekly payments continued. Hyman contradicted petitioner's version of the arrangement to Mrs. Kane and explained that petitioner wanted to make people think he had full control.

When O'Connor, the secretary-treasurer of the Teamsters local, first heard of the arrangement to pay $210 weekly, he told petitioner that it was impossible. Petitioner told O'Connor that $70 of the amount each week would be paid through each of them and that the remaining $70 weekly would come from petitioner's son, who would be placed on the payroll. Thereupon, petitioner and O'Connor obtained authorization from the local's executive board for increases in their expense allowances and for the employment of petitioner's son (Tr. 1953–1955). Petitioner assured O'Connor that after a few months he would be able, through his connections, to bring about a discontinuance of the weekly commitment (Tr. 1948, 1953–1955, 1961–1962). When O'Connor protested further, petitioner took him to see Hyman, who urged O'Connor to give the arrangement a thirty-day trial. Following this meeting, petitioner told O'Connor that Hyman was the

man who was receiving the $210 weekly (Tr. 1964–1966). The weekly payments continued at least until the early part of 1963 (Tr. 241–242).

When the vice-president of the local asked petitioner for additional expense money from the local's treasury, petitioner told him that this was impossible, as they had to pay out $210 a week to the persons from whom they had taken over the local. Petitioner said that he did not know how long they would have to continue these payments (Tr. 1895–1897). In the summer of 1962, O'Connor unsuccessfully attempted to force petitioner to discontinue the weekly payments by having the executive board reduce his own and petitioner's salaries and expense allowances and remove petitioner's son from the payroll (Tr. 2232–2238). When petitioner was reelected president of the local in 1963, he discharged O'Connor (Tr. 1898–1899).

ARGUMENT

Petitioner concedes that the evidence was sufficient to show a conspiracy to embezzle the funds of the labor organization in question prior to its merger with the local of which he was president (Pet. 4) and that, prior to such merger, persons influential in the management of the independent local agreed to recommend the merger only if they were paid the sum of $210 per week (Pet. 6). He appears to argue, however, that the payments after the merger do not violate 29 U.S.C. 501(c) on the grounds that (1) the executive board of the Teamsters local approved them, (2) he received no part of the payments himself, and (3) the payments were made for a legitimate union purpose.

The record shows no specific authorization by the executive board for the payments to Hyman and Cotliar. Prior to any executive board action, petitioner had told O'Connor that the sum would be made up by contributions of $70 apiece from them and by a further contribution of $70 by petitioner's son, who was to be placed on the payroll. While the board authorized the increased disbursements to petitioner and O'Connor and the salary for petitioner's son from which the weekly payments derived, there is no indication that the payments themselves—which continued to be made by concededly surreptitious means (Pet. 8)—were approved by the board. Moreover, nothing was done to acquaint the membership of the independent local (whose dues were drawn upon for a large portion of these payments) with petitioner's arrangement, and their approval of the merger was made in complete ignorance thereof. Even if a majority of the combined local had approved the payments, it is questionable whether this would have legitimized the expenditure. Cf. *Highway Truck Drivers* v. *Cohen*, 182 F. Supp. 608, 620 (E.D. Pa.), affirmed, 284 F. 2d 162 (C.A. 3), certiorari denied, 365 U.S. 833.

The fact that petitioner received no part of the $210 himself does not exonerate him. Section 501(c) expressly proscribes misappropriation to one's own use "or the use of another." See *United States* v. *Harrelson*, 223 F. Supp. 869, 870 (E. D. Mich.). Nor is it dispositive that petitioner deemed the payments necessary to effect the merger. The allegedly beneficial purpose of the weekly disbursements was a mat-

ter for the jury to consider.[2] As the court below found, "The record is replete with evidence from which the jury could have satisfied itself beyond a reasonable doubt that these defendants were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible" (Pet. App. 10a).

Section 501(c) is a comprehensive provision establishing criminal sanctions against those who misappropriate the assets of a labor organization in violation of their fiduciary obligations, as set forth in Section 501(a). See *United States* v. *Harmon*, 339 F. 2d 354, 356-358 (C.A. 6), certiorari denied, 380 U.S. 944. As the language of the statute indicates, Congress intended that it be interpreted and applied so as to secure a high degree of fiduciary responsibility on the part of representatives of labor organizations who occupy positions of trust. See H. Rep. No. 741, 86th Cong., 1st Sess., pp. 9, 44-45; S. Rep. No. 187, 86th Cong., 1st Sess., pp. 12, 42; cf. *Morisette* v.

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[2] The jury was properly instructed to consider the purpose of the disbursements (App. 97a):

> Section 501(c) of the Landrum-Griffin Act does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit *nor does it prohibit the use of bona fide expense accounts in furtherance of union interests.* However, if funds charged on union books to either salary or expense accounts which are *taken from the union for private, personal purposes and not expended in furtherance of the interests of the general union membership*, or if union payrolls and salaries are falsified and manipulated so as to provide funds from the union treasury *for non-union purposes*, such conduct is unlawful and in violation of Section 501(c) of the Landrum-Griffin Act. [Emphasis supplied.]

United States, 342 U.S. 246, 271–272. The evidence fully establishes, we submit, that petitioner's activities contravened both the letter and the spirit of Section 501(c).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1965.

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[a] The jury was properly instructed to consider the purpose of the disbursements (App. 97a):

> Section 501(c) of the Landrum-Griffin Act does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests. However, if funds charged on union books to either salary or expense accounts which are taken from the union for private, personal purposes and not expended in furtherance of the interests of the general union membership, or if union payrolls and salaries are falsified and manipulated so as to provide funds from the union treasury for non-union purposes, such conduct is unlawful and in violation of Section 501(c) of the Landrum-Griffin Act. [Emphasis supplied.]

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JOSEPH SCALZA, *Petitioner*,

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The appropriateness of the grant of certiorari in this case is emphasized by the arguments advanced by the Brief for the United States in Opposition:

1. The statement (Opp., p. 9) that "Section 501(c) is a comprehensive provision establishing criminal sanctions against those who misappropriate the assets

of a labor organization in violation of their fiduciary obligations, as set forth in Section 501(a)" represents the erroneous interpretation and extension of Section 501(c) which underlies the decision below and which warrants review by this Court.

The Government would thereby equate the two provisions, rewriting Section 501(c) to provide criminal sanctions for each and every violation of the fiduicary duties covered by Section 501(a). But Congress has not made such an equation. When Congress did want to encompass the fiduciary obligations of Section 501(a) within the ambit of some other section it exhibited its intent in unmistakable fashion—i.e., Section 501(b), which provides for a damage or accounting action by union members whenever any union officer or agent "is alleged to have violated the duties declared in subsection (a) of this section." The failure to include such an express adoption in Section 501(c) of the duties declared in Section 501(a) is conclusive evidence of a difference in coverage between the two sections.

While the language of Section 501(c) is concededly broad, covering "almost every kind of a taking, whether by larceny, theft, embezzlement or conversion," *United States* v. *Harmon*, 339 F. 2d 354, 357 (C.A. 6),[1] it is plain that Section 501(a) is even broader. The latter provision (see Opp., p. 2) imposes upon union officers and agents a high degree of

[1] The *Harmon* decision, cited by the Government (Opp., p. 9), in no way seeks to equate the provisions of Section 501(a) with the criminal sanctions of Section 501(c); it merely makes the point that the crimes specified in Section 501(c) are broadly defined within the limits of that section. See also *Morissette* v. *United States*, 342 U.S. 246, 271-272.

fiduciary or trust obligations with respect to union assets and conflicting interests. Many such obligations may be violated, such as making otherwise authorized expenditures contrary to some union by-law, without involving the criminal concepts of embezzlement. In short, not every violation of a fiduciary duty is an embezzlement.

Thus the attempt here made to convert Section 501(c) into the criminal equivalent of Section 501(a) deserves the most careful scrutiny by this Court in order to insure that the legislative pattern is not unduly disturbed or expanded. The danger is that the court below has created a criminal sanction for a Section 501(a) violation in a situation where Congress intended only a civil remedy under Section 501(b).

2. The Government's concession (Opp., p. 8) that the union's executive board here authorized the additional payments in question raises in critical form the question whether there can be a criminal embezzlement, within the meaning of Section 501(c), where such payments are authorized and are used for an allegedly union purpose.

The Government's reference (Opp., p. 8) to the lack of specific union authorization for payments to Hyman or Cotliar and to the failure to acquaint the membership of the local with the arrangement[2] impliedly

[2] The Government's statement (Opp., p. 8) that even if a majority of the membership approved the payments it would be "questionable whether this would have legitimized the expenditure" is relevant only to an argument that such approval would not justify a violation of a fiduciary duty imposed by Section 501(a). The case cited for the statement, *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608, 620 (E.D. Pa.), involved a civil action under Section 501(b) for a violation of Section 501(a).

recognizes that such detailed authorizations take the authorized payments out of the embezzlement concept, although a violation of a fiduciary duty might still exist. But the authorization that was made here by the union executive board would likewise deprive the payments of that surreptitiousness, lack of authority and stealth which are the hallmarks of illegal takings and embezzlements. Such payments conceivably could constitute a violation of the officers' fiduciary duties under Section 501(a), but they cannot fall into the embezzlement category when authorization is concededly present.[3]

Significantly, the Government does not deny that the authorized payments were devoted to what the petitioner at least conceived to be a union purpose of achieving a merger. It contents itself with the unsupported statement that it is not "dispositive that petitioner deemed the payments necessary to effect the merger." Opp., p. 8. But in a criminal prosecution, where a defendant's intent is critical, why should not petitioner's view of the purposes to which he put the money be dispositive? That question only augments the need for review and exploration by this Court.

Moreover, if the opinion of union officials as to the needs of the union be deemed irrelevant, who is to determine the bona fides of the union purpose and what standards are to be utilized? The Government merely

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[3] Section 501(c) "deals with a situation wherein moneys are taken when there is no authority to do so." Duker, Fiduciary Responsibility of Union Officials, in Slovenko, ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959 (1961), at p. 527.

says that it "was a matter for the jury to consider." Opp., pp. 8-9. But unless the jury is to be given carte blanche to reexamine and second guess the bona fides of the union's self-interests, some intelligent and workable criteria must be established. None such appears in the instructions relied upon by the Government. Opp., p. 9, fn. 3. The jury was told in most general terms that Section 501(c) does not prohibit the use of bona fide expense accounts "in furtherance of union interests" and that it is unlawful to use union payrolls and salaries "for non-union purposes." No attempt was made to define the meaning and scope of bona fide union purposes or interests; no word of guidance was said in terms of the conceded authorization by the union executive board, or the union's interest in the merger, or the petitioner's belief that the expenditures were in accordance with that interest.

In short, the jury was allowed to speculate freely and without limit about the special interests, problems or functions of the union. Therein lies the grave threat to union independence in pursuit of legitimate objectives. And therein lies the obvious need for review of the decision below. That need is in no way diluted by the Government's emphasis (Opp., p. 9) upon the lower court's statement that the defendants here "were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible." No amount of alleged reprehensibleness or brazenness or other unflattering characterizations can justify a judicial misreading and misapplication of the plain words of a criminal statute. See *Viereck* v. *United States,* 318 U.S. 236, 243.

For these reasons, supplementing those in the petition, a writ of certiorari should issue.

Respectfully submitted,

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